No. 883

FILED
MAR 11 1901
JAMES H. MCKENNEY

In the Supreme Court of the United States.

Brief of Spencer for Respondent

In the Matter

Filed Mar. 11, 1901.

of

The petition of EDWARD H. CLARKE for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

MEMORANDUM

ON BEHALF OF WILBUR LARREMORE, TRUSTEE.

NELSON S. SPENCER,
of Counsel.

LIVINGSTON MIDDLETON CO., 49 BEEKMAN ST., N. Y.

No. 262.

In the Supreme Court of the United States,

OCTOBER TERM 1901.

No. 262.

EDWARD H. CLARKE, *Petitioner*,

against

WILBUR LARREMORE, Trustee in Bankruptcy of RAYMOND W. KENNEY, Bankrupt, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF

FOR WILBUR LARREMORE, TRUSTEE, RESPONDENT.

NELSON S. SPENCER,
Of Counsel for the Trustee.

LIVINGSTON MIDDLEBROOK CO., 55 DUANE ST., N. Y.

In the Supreme Court of the United States.

EDWARD H. CLARKE,
Petitioner,

AGAINST

WILBUR LARREMORE, Trustee in bankruptcy of RAYMOND W. KENNEY, Bankrupt,
Respondent.

October Term, 1901.

No. 262.

Brief for Wilbur Larremore, Trustee, Respondent.

This record comes here in pursuance of a writ of *certiorari* issued to the United States Circuit Court of Appeals, for the Second Circuit (180 U. S., 640). The Circuit Court reviewed an order of the District Court of the United States, for the Southern District of New York, made on the 25th day of November, 1899 (Record, p. 62), which preserved for the benefit of the bankrupt's estate so much of the right under a judgment obtained by Edward Howard Clarke, the petitioner, against the bankrupt and under the levy made by the Sheriff of the County of New York in the State of New York, in pursuance of an execution issued to him on said judgment, as was represented by the proceeds of a sale made by said Sheriff under said execu-

tion, and which directed that the same pass to the trustee of the bankrupt for the benefit of the estate, and further directed that the said Sheriff pay and transfer to the trustee the amount of said proceeds and that all claims of Clarke to such proceeds be deemed transferred and conveyed to the trustee.

This order was made under the authority of and in accordance with the provisions of §67f of the Bankrupt Act.

The Circuit Court of Appeals also reviewed an order of said District Court made on the 21st day of July, 1899 (Record, p. 34), enjoining the said Sheriff from paying over the proceeds of said sale to the petitioner or to any other person than the trustee of the bankrupt, until the further order of the Court in the premises. This order was preliminary to the order of November 25th, 1899. No error is assigned in the making of this order which is not also involved in the making of the order of November 25th, 1899.

Statement of the Case.

On the 13th day of April, 1899, certain creditors of Raymond W. Kenney, then doing business in the City of New York as a fur merchant, filed a petition in the District Court of the United States for the Southern District of New York, praying that he be adjudged a bankrupt upon the ground that he, being insolvent, had committed an act of bankruptcy in suffering Edward Howard Clarke, within four months prior thereto, namely, on the 6th day of March, 1899, to obtain a judgment against him in the Supreme Court of the State of New York for the sum of $20,906.66 (Record, p. 10). It appeared from said petition and in later proceedings that an execution had been issued on said judgment to the Sheriff of the County of New York, and that a levy had been made

by the Sheriff thereunder on Kenney's stock in trade, in pursuance of which the Sheriff had sold the property on which he had levied on the 15th day of March, 1899, and realized therefrom the sum of $12,451.09. This sum the Sheriff then held. On this petition a subpœna was issued returnable on the 20th day of April, 1899 (Record, p. 12).

On the same day on which the petition was filed, namely, the 13th day of April, 1899, upon affidavits showing among other things the facts relative to the entry of Clarke's judgment, the District Court made an order requiring Kenney, the Sheriff and Clarke to show cause on the 18th day of April, 1899, why the Sheriff should not be enjoined from paying over to Clarke any of the proceeds of the sale made by the Sheriff under the execution and enjoining him from doing so until the hearing upon such order (Record, pp. 13-21).

This motion and the petition in bankruptcy were heard together. Messrs. Horwitz & Samuels, Mr. Clarke's present counsel, appeared for Kenney, and interposed an answer to the petition (Record, p. 22). The issue raised thereby was tried before the Court. From the testimony then taken it appeared, among other things, that Clarke was Kenney's father-in-law (Record, p. 24); that Clarke's action was brought upon certain promissory notes made by Kenney to his wife in 1894, but which had been in the latter's possession from that time until June, 1898, when he took them from his safe and gave them to his wife; that between March 4th and 6th, 1899, he had assigned about $8,000 of his accounts receivable to Clarke; that on the sale under the execution goods had been bid in on Kenney's behalf at about one-third of their real value (Record, p. 26), and it appeared in the testimony before the Referee, to which reference will presently be made, that these goods subsequently found their way to Mr. Kenney's new business in which Clarke was a partner (Record, p. 58).

Mr. Kenney subsequently withdrew his objections to being adjudicated a bankrupt and he was thereupon and

on the 12th day of July, 1899, duly adjudicated a bankrupt (Record, p. 22).

On the 20th day of July, 1899, the District Court made an order (Record, p. 34) upon and reciting the petition that Kenney be adjudicated a bankrupt, the order to show cause of April 13th, 1899, the trial of the issue of bankruptcy, the adjudication of bankruptcy, proof submitted by Clarke in opposition, the default of the Sheriff, and after hearing Clarke's counsel, which continued the injunction against the Sheriff and Clarke and directed the Sheriff to pay over the sum realized on the execution sale under Clarke's judgment to the Trustee of the bankrupt when appointed. As all the parties were before the Court, this order was in itself an adjudication that Clarke's judgment was a preference and an act of bankruptcy within the provisions of the bankrupt law.

On the 26th day of September, 1899, Mr. Wilbur Larremore was elected trustee in bankruptcy.

Upon the bankrupt's examination before the Referee it appeared, among other things (Record, pp. 57-61), that Mr. Clarke is his wife's father, that he lives at Rockland, Maine, but always stays with the bankrupt when in the City of New York; that Messrs. Horwitz and Samuels are the bankrupt's attorneys; that Mr. George Bell, who acted for Clarke in procuring the judgment against Kenney, had been and was the bankrupt's attorney in other proceedings then pending. That the notes on which the judgment was procured were notes held by his wife and represented a loan by her to him in 1894, on which he had never paid any interest or anything on account of the principal; that these notes were transferred by her to Clarke, who brought suit against him; that he assigned to Clarke accounts amounting to $7,000, for which there was no consideration except the notes represented by the judgment; that on the Sheriff's sale under the execution he assisted one Wagner in buying goods worth $15,000 for $5,000, which were subsequently sold in part to a firm known as "Kenney," formed in June, 1899, to carry on the fur business,

composed of Clarke and one W. W. Hart, which employs the bankrupt; that Clarke was never before in the fur business, has contributed $1,500 in capital of the firm, and never comes into the store, but has given the bankrupt his power of attorney to do anything for him; and that the bankrupt has no interest in the business, but nevertheless made the arrangements for organizing it and manages it.

Upon the petition of the trustee (Record, p. 37) the District Court made an order (Record, p. 62) based upon all the proceedings before the Court and the Referee, specifically reciting them and including the testimony taken, which directed that "so much of the right under the judgment obtained by said Edward Howard Clarke against said Raymond W. Kenney for the sum of $20,906.66 on the 6th day of March, 1899, in the Supreme Court of the State of New York, and the levy made by the said Thomas J. Dunn, Sheriff of the County of New York, under the execution issued to him upon the said judgment, as is represented by the proceeds of the sale made by said Sheriff under said execution, be and it is hereby preserved for the benefit of the estate of the said Raymond W. Kenney, bankrupt, and that the same pass to and shall be preserved by Wilbur Larremore, Esq., trustee, for the benefit of said estate;" and that the sheriff transfer the said sum of money to said Trustee and that all claims of Clarke to said sum of money under said judgment, execution or levy be deemed transferred and conveyed to the trustee. This order was made after hearing Clarke, Kenney, the sheriff and the petitioning creditors. As all parties were before the Court, this order was again an adjudication upon the merits, including among other things, the fact that Clarke's judgment was a preference and an act of bankruptcy within the provisions of the bankrupt law.

Mr. Clarke alone presented a petition to the Circuit Court of Appeals to review this order and incidentally the order of July 20th, 1899. The sheriff did not join him but remained satisfied with the disposition of the

matter made by the District Court. No question of jurisdiction is involved, not only because it can only be raised by the sheriff, who is not here to raise it, and because it is not assigned as a ground of error, but also because Mr. Clarke's counsel, on the argument before the Circuit Court of Appeals, expressly waived it. (Record, p. 77.)

The Circuit Court has affirmed the orders and this writ of *certiorari* is to review their determination. The opinions rendered by the District Court at the time of making the orders reviewed and by the Circuit Court of Appeals upon their affirmance appear in the Record at pp. 65, 66 and 72 respectively.

The single ground of error on this record assigned by the petitioner isthat the proceeds of the execution sale in the sheriff's hands have become the property of Clarke and have ceased to be that of the bankrupt and therefore are not subject to the provisions of the bankrupt law in pursuance of which the orders were made.

ARGUMENT.

I.

The Trustee is entitled to the proceeds of sale under §67f of the Bankrupt Act.

That section is as follows:

"That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid. And the court may order such conveyance as shall be necessary to carry the purposes of this section into effect: *Provided*, That nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value who shall have acquired the same without notice or reasonable cause for inquiry."

Inasmuch as Mr. Kenney was adjudicated a bankrupt, Mr. Clarke's judgment against him and the levy of the Sheriff thereunder became, by the operation of this section, null and void. On this point there is no controversy. The property *affected* by the judgment and levy also became, by the provisions of the section, wholly discharged and released therefrom, unless the Court otherwise ordered. If it were necessary to

rely upon it, this provision of the statute is in itself sufficient for the purposes of the trustee. For the property *affected* by the judgment and levy is not necessarily the property of the bankrupt (the section does not mention *his* property), but is equally the property, the money, in the hands of the Sheriff.

But the Court may also, as it has here done, order that *the right under the judgment* and levy shall be preserved for the benefit of the estate. The right preserved is any right, including the lienor's or judgment creditor's right, and that is passed to the trustee. The Court is further authorized to order such conveyance—that is, in this case, necessarily, a conveyance of the judgment creditor's right—as may be necessary to carry the section into effect. The Court has, consequently, ordered that Clarke's claims under his judgment, execution or levy be deemed transferred and conveyed to the trustee.

The objections urged on behalf of the petitioner to this plain reading of the statute touch very lightly on the essential and determining point. That point is, briefly stated, that the petitioner's rights fall with his judgment. We may easily concede that the money in the Sheriff's hands is and was at the time of the adjudication of bankruptcy *prima facie* the property of Mr. Clarke. It is true, if Mr. Clarke have a valid judgment. But the judgment has been rendered void. He recovered his judgment subject to the operation of the bankrupt act and the provisions of that act must be read into his judgment contract.

Mather v. *Brush*, 16 Johns., 233.
Walker v. *Whitehead*, 16 Wall., 314.
Barnitz v. *Beverly*, 163 U. S., 118, 123, 124.
Bronson v. *Kinzie*, 1 How., 311, 319.

A void judgment may be such *ab initio*, in which case all acts performed under it and all claims growing out of it are also void and it may be wholly disregarded. (Freeman on Judgments, 4th Ed., §117), or it may be

such because of a fact subsequent or of error. Such a fact subsequent as to a judgment recovered within the four months period is the adjudication of bankruptcy under the Bankrupt Act. The legal situation is the same as if the judgment had been reversed for error. The judgment is as if it had never been made. But while it is unreversed it is valid and a protection to the Sheriff. A *bona fide* purchaser on a sale made by its authority is protected but the proceeds must be restored to the judgment debtor or to any one who has succeeded to his rights.

The Bank of the United States v. *The Bank of Washington*, 6 Pet., 8.
Northwestern Fuel Co. v. *Brock*, 139 U. S., 216.

In the latter case Judge Field says: "The right of restitution of what one has lost by the enforcement of a judgment subsequently reversed has been recognized in the law of England from a very early period, and the only question there has been as to the proceedings to enforce the restitution." After quoting the *United States Bank* v. *Bank of Washington*, he proceeds: "We are of the opinion that the proceeding to enforce the restitution in the cases mentioned is under the control of the Court, and that all needed inquiry can be had to guide its judgment in a summary proceeding, the only requisite being that the opposite party shall be heard, so that in directing restitution no further wrong be committed."

In *Haebler* v. *Myers*, 132 N. Y., 363, the facts were that by virtue of a levy under an attachment procured by the plaintiff, the Sheriff received $900. The defendants as subsequent lienors moved to vacate the attachment and succeeded. The Sheriff thereupon paid the $900 to the defendants. On appeal the order vacating the attachment was reversed. Pending the appeal the plaintiffs recovered a judgment in their suit and issued an execution which was returned unsatisfied. They then sought to recover from the defendants the amount paid the

latter by the Sheriff. The Court say: "While the erroneous order was a protection to the Sheriff, who acted upon it while it was in force, it is no protection to the defendants, because it was subsequently reversed on appeal and *became, as to them, the same as if it had never been made.* When they accepted the money that was paid over in consequence of the order that they procured, they knew that if the order should be reversed and their motion denied, they would no longer be entitled to it, and could not in fairness retain it. They also knew that if, in the meantime, the plaintiffs perfected judgment and issued execution, their right to the money, if not paid over, would be complete upon a reversal of the order. As they acted with knowledge of all the facts, it would be inequitable for them to retain money received under such circumstances, and we see no reason why the law should not infer a promise of restitution *the same as if the money had been collected under an execution.* In either case the inference rests upon the fact that money was received by those who knew at the time that it might ultimately be decided that they were not entitled to it. But to whom did the implied promise run? Obviously to those who would have been entitled to the money upon the reversal of the order, provided it had not been paid to the defendants."

So, here, Mr. Clarke knew that his judgment was subject to be defeated by the filing of a petition in bankruptcy within four months from the date of its recovery followed by an adjudication. It is not necessary that the act rendering the judgment void should relate back to the time of filing the petition except in the same way that the reversal of an erroneous judgment relates back. The Sheriff and *bona fide* purchasers are protected for acts done under it and the proceeds of a sale of the goods take the place of the goods.

This plainly appears in the case of *Conner v. Long*, 104 U. S., 228, where, under the Act of 1867, the dissolution of an attachment lien was considered. By that act the assignment from the register to the assignee did relate back to the commencement

of the proceedings in bankruptcy. The Court held that the title of the bankrupt was defeasible and when the petition is made it is devested as of the date when the petition is filed. It was argued that when the attachment proceedings had resulted in a disposition of the property prior to the actual conveyance to the assignee the title would not pass to him. That is, in substance, the argument here made. The Court, however, held otherwise, and that it is the title to property subject to an attachment only when levied within four months next preceding the commencement of the bankruptcy proceedings, which becomes vested in the assignee by relation, the same attachment being thereby dissolved as of that date. It then says: "One consequence is, that if property of the debtor, levied on under such an attachment, has been sold prior to the filing of the petition in bankruptcy, but thereafter the proceeds of the sale remain in the hands of the Sheriff, or *before the assignment have been applied to the payment of the judgment in the attachment suit, the rights of the assignee attach to the money and cannot follow the property sold;* for the latter not being subject to the attachment at the commencement of the bankruptcy proceedings, the title thereto is not thereby transferred to the assignee; but the attachment being dissolved upon that event, *the right to the proceeds of the sale passes* under the assignment, released from the claims of all parties to the attachment suit, as of the date of the commencement of the proceedings in bankruptcy. And in such a case the plaintiff in the attachment suit, *having received the proceeds of the sale on his judgment*, would be liable to an action by the assignee for that sum of money had and received to his use; or, *if it remained in the hands of the Sheriff*, the assignee might become a party to the action, and *obtain an order of the Court requiring the amount to be paid directly to himself.*"

The Court in this case was considering not only the case of an attachment, but also of an execution, and its language therefore expressly applies to this case.

Although the language of the present Statute makes the judgment in terms void, it relieves the court of any doubt as to the result of the avoidance by providing

specifically that "nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment, or other lien, of a *bona fide* purchaser for value, who shall have acquired the same without notice or reasonable cause for inquiry." In other words, the judgment is made void precisely as a judgment for error is made void—*bona fide* purchasers are protected, and the proceeds of the sale take the place of the bankrupt's property. But the judgment creditor's right to those proceeds ceases; he is required to surrender his claim thereto, and the trustee is vested therewith. The trustee occupies the place which the judgment debtor would otherwise have occupied upon the determination that the judgment is void. The scheme is consistent and complete.

II.

The argument for the petitioner.

The argument of the petitioner's counsel is subtle and elusive. The major part of his propositions of law may be safely admitted in the abstract, but their applicability to the case in hand is not always apparent.

I.—It is not true that because the proceeds of an execution sale are the property of the judgment creditor, and not of the judgment debtor, it can be assumed that Congress intended to make the judgment void only where property levied upon had not been sold. The contrary intention is apparent from a reasonable consideration of the entire section.

He is in error in saying (p. 6) that Congress authorized the preservation of the *lien*. It is the *right under the judgment* which may be so preserved. The judgment is void, but, as the property may have been sold to a *bona fide* purchaser, the right, under the judgment, whatever it may be, is preserved and passed to the trustee.

It is unimportant that the section does not in terms specify an execution. If it were important, it would be included under "other liens," which are specified. The judgment is the essential thing, and that is made null and void.

It may be conceded that the act vests title in the trustee as of the date of the adjudication. But the same fact of adjudication makes Clarke's judgment void, and the bankrupt, or the trustee who succeeds to his rights, thereupon becomes entitled to the return of the property affected by it or its proceeds.

II.—It is not worth while to discuss the English Bankruptcy Act, for it is wholly dissimilar from the Act of 1898. The Act of 1898 must be construed strictly according to its terms.

Wilson v. *Nelson*, 183 U. S., 191.

It is sufficient to say that the English Act does not make the judgment, or in its case the execution, void, as does the Act of 1898.

III.—It is not material to consider whether the words "null and void" in §67f relate back from the time of adjudication. The judgment simply becomes as if it had never existed. But it is not necessary to hold that thereby the Sheriff becomes a trespasser, any more than it is necessary to hold that the title of a *bona fide* purchaser is affected. Neither of those facts follow from a void judgment which had a legal inception. The rights of the judgment creditor only are wiped out unless the Court orders their preservation for the benefit of the estate. Nor does any retroactive construction make §67f conflict with §60. §67f is simply additional to §60. It was an addition made by the Senate to the bill as passed by the House of Representatives and is to be considered as conferring a further right upon the trustee (*In re Richards*, 96 Fed. Rep., 935). Under either section the ultimate result is the same. For, under §60a, the

judgment is a preference (*Wilson* v. *Nelson,* 183 U. S., 191), and it has been here so adjudicated by the District Court. Under §60b it is "voidable by the trustee and he may recover the property or its value from" Clarke. The trustee is, therefore, even without the aid of §67f, entitled to the sum in question. §67f goes further and makes the judgment not only voidable but void irrespective of any intent on the part of the debtor or the creditor.

The petitioner's counsel is in error in saying that no remedy is given to the trustee to recover the fund in question. By the terms of the section the right under the judgment passes to the trustee, and the Court may order such conveyance as shall be necessary to carry the provisions of the section into effect. Further authority is found in §2, sub-divisions 7, 13 and 15.

IV.—The right preserved by §67f is any right, either of the debtor or the creditor. The particular right is not specified. It is the right to the proceeds of sale.

V.—The proviso of the section was evidently inserted to indicate the nature of the fact of avoidance. Otherwise it might be open to argument, whether or not the judgment was so much avoided *ab initio* as to wipe out intervening rights of innocent parties. It is immaterial from this point of view whether the sale was before or after an adjudication. It would be a strained construction of the statute to hold that it applied only to sales after the adjudication.

VI.—We may adopt the quotation of the petitioner's counsel (p. 54) from *Clarke* v. *Iselin,* 21 Wall., 360, 377, as strictly applicable to this case and add to it the remarks of this Court in *Pirie* v. *Chicago Title & Trust Co.,* 182 U. S., 438: "It is hardly necessary to assert that the object of a bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt—not among some of the creditors, but among all of them.

Such object could not be secured if there were no provisions against preferences—no provisions for defeating their purpose. * * * Undoubtedly all of the sections of the act must be construed together as means to effect its purpose, and some of its sections are closely related. It does not follow, however, that each section should not be given the meaning its language conveys, if clear and consistent."

In this case, if Mr. Clarke's contention is correct, he will receive the entire estate and the remaining creditors will receive nothing.

III.

The decree of the United States Circuit Court of Appeals should be affirmed with costs.

NELSON S. SPENCER,
Of Counsel for Wilbur Larremore,
Trustee.